NOTICE OF MEETING

TO: Members of the Health Law Committee of the Business Law Section of the State Bar of California

FROM: Steve Lipton and John Chesley, Co-Chairs

DATE: November 4, 2005

RE: MEETING OF HEALTH LAW COMMITTEE
FRIDAY, NOVEMBER 11, 2005
8:00 a.m. — 10:00 a.m.

The next meeting of the Health Law Committee of the Business Law Section of the State Bar of California will be held by videoconference at the following locations on Friday, November 11, 2005:

Ropes & Gray LLP
One Embarcadero Center, Suite 2200
San Francisco, CA 94111-3627
T: (415) 315-6300
F: (415) 315-6350

Paul, Hastings, Janofsky & Walker LLP
515 South Flower Street, Twenty-fifty Floor
Los Angeles, CA 90071
T: (213) 683-6000
F: (213) 996-3062

Foley & Lardner LLP
11250 El Camino Real, Suite 2200
San Diego, CA 92130
T: (858) 847-6700
F: (858) 792-6773

To participate by telephone if you cannot attend in person:
Step 1: Dial 1-800-504-4847
Step 2: Enter Access Code: 9652444

If you are unable to attend the meeting, please contact John Chesley (415-315-6394); (john.chesley@ropesgray.com) or Steve Lipton (415-276-6550; stevelipton@dwt.com), to inform either of them of your absence and to provide a report of the status of any projects you are working on for the Committee.

AGENDA

HEALTH LAW COMMITTEE MEETING

FRIDAY, NOVEMBER 11, 2005

8:00 a.m. — 10:00 a.m.

TELECONFERENCE INSTRUCTIONS:
Global Crossing Video Conference ID: 621921

To participate by telephone if you cannot attend in person:
Step 1: Dial 1-800-504-4847
Step 2: Enter Access Code: 9652444

I. Introductory Remarks and Approval of Minutes

1.1. Introductions

1.2. Approval of Minutes of October 14, 2005 meeting (Attachment A)

II. Standing Reports

2.1. Executive Committee Liaison — Lucas

2.2. Legislation — Co-chairs

2.2.1. Amending California Uniform Health Care Decisions Act, Cal. Prob. Code Section 4600 et seq. — Vukadinovich (Attachment B)

2.2.2. Legislative Report — Doyle

2.2.3. Letter of Introduction to Legislators – Doyle and Co-chairs

2.3. Communications — Sano

2.3.1. Website Contents — Biographies of new members

2.4. Education — Scarano

2.4.1. SEI Topic

III. Educational Presentation Arbitration clauses — Brent (Attachment C)

IV. Outreach

4.1.1. Scholarship/Essay Contest — Vuleadinovich, Fogliani and Brent

4.1.2. Budget Request

V. Open discussion of Committee Goals for current year (Continued from October meeting)

VI. Committee Leadership and Membership — Co-chairs

6.1. Committee Chair Vacancy: Legislation

6.2. Recruiting new members

6.2.1. Fred Weil (Attachment D)

6.2.2. Vacancies

6.2.3. Rebalancing terms

VII. Discussion of Continuing Projects Not Covered Elsewhere — Co-chairs

VIII. Forward Calendar — Co-chairs

8.1. Health law specialization

8.2. Website review

8.3. eBlasts

8.4. Development of topic for 2006 Annual Meeting
(Submission deadline — January 25, 2006)

IX. Hot Topics — Carrie Fogliani and Members

9.1. Katrina —

9.2. Open Mike

X. Adjornment

Attachment A

MINUTES OF THE COMMITTEE ON HEALTH LAW
STATE BAR OF CALIFORNIA

Friday, October 14, 2005

The Committee on Health Law of the Business Law Section of the State Bar of California met by videoconference generously hosted by Ropes & Gray LLP, Paul, Hastings, Janofsky & Walker LLP and Foley & Lardner LLP.

Attendance. See attendance roster distributed separately. Co-chairs John Chelsey and Steve Lipton presided.

Introductory Remarks and Approval of Minutes

A. Introductions.

B. Approval of Minutes of September 16, 2005 meeting (Attachment A). The Committee approved the minutes of the September 16, 2005 meeting.

Standing Reports

A. Executive Committee — Lucas. Time for "house cleaning."

B. Legislation

1. Amending California Uniform Health Care Decisions Act, Cal. Prob. Code Section 4600 et. seq. - David Vukadinovich - Working group drafted proposed legislation which was submitted to Business Law Section with courtesy copies to Family Law Section and Probate Section. Probate Section wanted three changes: (1) remove provision allowing healthcare providers to make decisions in absence of another healthcare provider; (2) add process with evenly divided class – if evenly divided that class is eliminated from making decision; and (3) remove "close friend" from list of hierarchy. General discussion regarding the Probate Section's proposed changes ensued. General consensus that Probate's proposed change 1 was OK. Members had an issue with Probate's proposed change 2 – many felt that the proposed language would not work as drafted by the Probate Section. The working group would draft revised language and work with the Probate Section to find mutually acceptable language. David had issue with Probates proposed change 3 for two reasons: (a) he believes a friend is often the surrogate decision maker and (b) there is case law that suggests a close friend is acceptable. A compromise was discussed in which the language excluded for the "close friend" definition caregivers in institutional settings. Carol will propose to the Business Law Section that the working group collaborate with the Probate Section to find mutually acceptable language. David will call Peter Stern to let him know the Committee's preference to try to work out the differences. Carol will find out the deadline for submitting to proposed bill to the Board of Governors. The working group will distribute any changes.

C. Legislative report. Doyle – traveling

D. Communications – Sano –

1. Kazu will update the web site. New members need to send Kazu their bios for the web site.

2. All members should forward comments on the mission statement of the Committee to Kazu.

3. Kazu plans to increase number of e-blasts from committee (but not to an excessive level). If any members have any current issues that come across their desk, they should send to the information to Kazu

4. Kazu asked if there were any volunteers to help work on website – none came forward during the meeting.

E. Education - Scarano

1. SEI topic – Potential topic which focuses on common issues that arise in healthcare transactions for general bar members. The SEI program is in January. Application for spot on program has been accepted. Mike has a partner that could be a speaker for "prosecutorial" type. Probably need another speaker, perhaps a fraud and abuse expert type. Steve will check with Jill Gordon to see if she is interested. There is also an opportunity to present 1-2 hour slot in early October at the annual State Bar meeting. Deadline for submitting proposal is Jan 25th, 2006. Discussion of an appropriate topic for the annual meeting to be placed on agenda for next meeting.

2. Bob offered to provide a talk regarding arbitration clauses and mediation. Steve suggested Bob could give talk for as a Committee CLE program at an upcoming meeting. John also thought such a program could be for a teleconference. Bob and Mike will talk.

III. Open discussion of committee goals

A. Mission statement discussion.

1. Education focus - Steve discussed one focus of helping non healthcare lawyers understand healthcare issues. No one had any other aspects of the educational role on which they wanted to comment.

2. Legislative focus. Two examples. One is the bill discussed above. Second is a Committee proposed bill that was enacted to add dentists to list of professional practices that can form a professional association. Other aspect of this function is the opportunity to comment on proposals not originated by the Committee. Question posed on whether the Committee should take a role with the legislature directly. This would require a look at pending legislation to see if there is any on which the Committee may want to comment. Kevin Lacy volunteered to take lead on this. Also, the Committee should provide a letter of introduction to the legislature as it did last year.

3. Promote efficiency of health law practice including a review of establishing a formal specialization – This will be put on the agenda for a future meeting.

4. Interface and collaborate with other professional organizations.

a. Discussion – the Committee has had interactions with other groups. At one point the Committee had a liaison from the California Society for Healthcare Attorneys.

b. LA County Bar - Judy is Chair of the LA County Bar Association Health Law Section. She agreed to be the liaison and Jim graciously agreed to be replaced by Judy.

c. Writing Competition - Bob raised question if the Committee had done anything with universities. David raised issue of sponsoring a writing competition. The Committee has budget that it has never spent. David had raised the issue with Susan Orloff who thought it was great idea that nobody else is doing. The Committee needs to be sure it budgets for the writing competition up front and that it gets approved by Executive Committee. Abby volunteered to take the lead on the writing competition, with David and Bob assisting. Possible topic is the proposed bill regarding healthcare decisions. The issue of the amount of the prize was discussed with suggestions ranging from $1000 - $2500. John and Steve will talk to Susan Orloff to get her input on the amount of the prize. Should look into having the winning submission published.

d. Further Discussion – Will discuss mission statement at next meeting once all Members have had an opportunity to review.

IV. Committee Leadership and Membership.

A. Chair vacancy: Legislative - looking for volunteers –Kevin Lacy said he would consider it but needed to better understand the time commitment.

B. Membership. The Committee is two members short.

1. One application has been submitted by Fred Weil from Redding, California.

2. Suggestion was made that it would be helpful to have a new Member from Sacramento or that works for Kaiser.

3. David Krause – he had an issue with not being able to be reimbursed for dues. Steve and John will discuss the waiver of dues with Susan Orloff. Need to understand if it is just the Section dues or the entire State Bar dues that are at issue.

4. Staggering issue – four members leaving at end of 2006, no members at end of 2007 and nine at 2008

V. Meeting schedule –

A.. Meetings will be 2 hours except when there is a CLE presentation, in which case the meetings will be expanded to 2.5 hours.

B. Next Meeting is November 11, 2005.

C. No decision was made on whether the Committee should hold a joint in person meeting in January. Place on agenda at next meeting.

VI. Hot topics – Any war stories –

A. Tobacco tax initiative - Steve – A lead priority for the California Hospital Association is to increase the California tobacco tax by anywhere from $1.50 to $5.00 per pack. The purpose of the additional tax is to raise money for emergency services. The initiative would set up a fund, 65% of which would go to fund ER services, some would go to ER physicians, some to other areas that might see a reduction in funding by the higher tax such as breast cancer and some would go to fund efforts to prevent tobacco tax evasion.

b. John spoke re St. Vincent in LA

C. Cary Figioni will speak regarding managing hospitals during natural disasters.

D. Steve also discussed an issue regarding additional efforts to require charity care at local level – The Sacramento city council is looking at requiring that any rebuilding/retrofitting must include review of principles of charity care and that 30% of construction workers must live in Sacramento.

E. Members were encouraged to bring ideas to next meeting

VII. Adjournment at 9:55.

HEALTH LAW COMMITTEE

2005-2006

ATTENDANCE ROSTER

	OCT (Video)									
BRENT	X									
CHESLEY	X									
FOGLIANI										
LACY	X									
LIPTON	X									
MALINIAK	X									
OTT	X									
OWENS	X									
SANO	X									
SCARANO	X									
SCOTT										
VACCARO	X									
VUKADINOVICH	X									
Liaisons:										
LUCAS	X									

KEY: X = PRESENT

T = VIA TELEPHONE

Attachment B

Business Law Section
State Bar of California

1215 "K" Street, Suite 1920
Sacramento, California 95814
Telephone: (916) 442-8018
Facsimile: (916) 442-6196

October 18, 2005

To: Larry Doyle, Office of Governmental Affairs

From: Jeffrey C. Selman, Vice-Chair, Legislation
Executive Committee, Business Law Section

Re: Proposal to Add a New Section 4712 to the California Probate Code

Section Action:

Approved by BLS Executive Committee: July 27, 2005

Approved by Health Law Committee: June 10, 2005
Vote: Unanimous

Section Contacts:

Executive Committee Contact:	**Health Law Committee Contact:**
Jeffrey C. Selman Heller Ehrman White & McAuliffe, LLP 275 Middlefield Road Menlo Park, California 94025 Tel: (650) 324-7196 Fax: (650) 324-6625 Email: jselman@hewm.com	David Vukadinovich Co-Chair, Health Law Committee Catholic Healthcare West 251 S. Lake Avenue, 7th Floor Pasadena, California 91101 Tel: (626) 744-2375 Fax: (818) 502-7289 E-mail: david.vukadinovich@chw.edumailto:jfotenos@grmslaw.com

I. History, Existing Law, and Purpose

The mission statement of the Health Law Committee (the "Committee") of the Business Law Section provides that it shall "study, review, consider, discuss and develop formal positions on issues involving laws, regulations and governmental action affecting health care issues and . . . advocate for such positions." The Committee has concluded that amending the California Probate Code (the "Code") by adding a new Section 4712, as proposed, to include a list of individuals permitted and authorized by law to make health care decisions for patients who lack capacity to make such decisions for themselves and who do not otherwise have a surrogate decision maker to act on their behalf, would improve the Code and promote certainty and efficiency in the delivery of health care services in the State of California.

History. Division 4.7, commencing with Section 4600 *et seq.*, was added to the California Probate Code in 1999. 1999 Stats. c. 658 (A.B. 891), § 39, operative July 1, 2000. Commonly known as the "Health Care Decisions Law," Division 4.7 was modeled on the Uniform Health-Care Decisions Act drafted by the National Conference of Commissioners of Uniform State Laws at its Annual Conference held July 30 through August 6, 1993 (the "Uniform Act").[1] Numerous states have adopted the Uniform Act either its in entirety or in amended form. *See, e.g.*, Delaware, 70 Del. Laws, c. 392 (1996); Hawaii, 1999, Act 169; Maine, 1995, c. 378; Mississippi, 1998, c. 542; and New Mexico, 1995, c. 182; Wyoming, 2004-2005, HB 107. The American Bar Association, American Association of Retired Persons (AARP), and the ABA Commission on Legal Problems of the Elderly have all endorsed the Uniform Act.

The preamble materials to the Uniform Act state that its purpose "aims at assisting individuals and the medical profession in better assuring a person's right to choose or reject a particular course of treatment." The Uniform Act achieves that purpose through two primary means. First, the Uniform Act sets forth a model statutory scheme allowing an individual who has capacity to designate a surrogate for purposes of making health care decisions in the event that the individual loses capacity. Second, the Uniform Act sets forth a "priority list" of persons authorized to act as a surrogate decision maker in the event that an incapacitated patient did not select a surrogate prior to be becoming incapacitated.

The California Health Care Decisions Law is substantively consistent with the Uniform Act; however, at the time of adopting the Uniform Act in 1999, the California Legislature ("Legislature") chose not to include the priority list of authorized persons. The Committee has determined that the Legislature made that decision based, at least in part, on the Uniform Act's intentional omission from the priority list of domestic partners. Rather than include domestic partners on the priority list, the Comment to the Uniform Act recommended that "those in non-traditional relationships who want to make certain that health-care decisions are made by their companions should execute powers of attorney for health care designating them as agents." Due to the

[1] The Uniform Act is available at: http://www.law.upenn.edu/bll/ulc/fnact99/1990s/uhcda93.htm.

Uniform Act's intentional omission, the Legislature considered the proposed priority list incomplete and chose not to include it in the California Health Care Decisions Law.

Significantly, in 2001 the Legislature resolved the issue concerning authority of registered domestic partners by adding Probate Code Section 4716. 2001 Stats. c. 893 (A.B. 25), § 49. Section 4716 provides that: "If a patient lacks the capacity to make a health care decision, the patient's registered domestic partner shall have the same authority as a spouse has to make a health care decision for his or her incapacitated spouse." The term "registered domestic partner," as used in the proposed law set forth below, is cross-referenced to Probate Code Section 4716 and entirely consistent with the definition of that term contained in Family Code Section 297 (operative Jan. 1, 2005), which addresses registration of domestic partners with the California Secretary of State.

While the Legislature has addressed the authority of registered domestic partners to consent to medical treatment, the Legislature never adopted any provision granting decision making authority to an incapacitated patient's spouse or any other relative in the absence of a spouse or registered domestic partner. Now that the issue regarding registered domestic partners is resolved, Section 4712, as proposed, would essentially add the priority list included in the Uniform Act to the Probate Code (with the addition of registered domestic partners consistent with current law), thus revisiting the decision in 1999 not to adopt that provision of the Uniform Act due to the omission of registered domestic partners.

Existing Law. Consistent with the Uniform Act, the California Health Care Decisions Law allows an individual to execute a power of attorney for health care[2] or individual health care instruction.[3] Powers of attorney for health care and individual health care instructions are collectively referred to as "advance directives."[4] Advance directives can be used by an individual (the "Principal"), while having capacity to make health care decisions, either to: (1) designate an individual to act as the Principal's surrogate decision maker (the "Agent") in the event that the Principal becomes incapacitated and cannot make health care decisions for him or herself; or (2) allow the Principal to express his or her desires concerning health care treatment options so that decisions can be made on the Principal's behalf in the event that the Principal becomes incapacitated.

While the Health Care Decisions Law promotes certainty by allowing California residents to execute an advance directive, current law fails to provide certainty for the large number of individuals who do not execute an advance directive. Rather, with the exception of Section 4716 quoted above, current California statutes provide no guidance to health care providers or patients' families as to who may make health care

---

[2] A "power of attorney for health care" is "a written instrument designating an agent to make health care decisions for the principal." Cal. Prob. Code § 4629.

[3] An "individual health care instruction" is "a patient's written or oral direction concerning a health care decision for the patient." *Id.* § 4623.

[4] *Id.* § 4605.

decisions on behalf of an incapacitated patient who lacks an advance directive that names an Agent.

Purpose. The purpose of the proposed addition of Section 4712 is to authorize an incapacitated patient's spouse or registered domestic partner, designated family member, or other relative, in the order provided, to act on behalf of the patient and consent to medically necessary services. The Committee has debated the merits of each aspect of Section 4712 as proposed and, while the Committee has borrowed significantly from the text of the Uniform Act in drafting the proposed law, it has been careful to draft a law that it believes improves upon the Uniform Act and fits within California's statutory framework. The substance of the proposed law, including the order of authority, is consistent with similar laws enacted by other states. *See, e.g.*, Ariz. Rev. Stats. § 36-3231; Ill. Rev. Stats. ch. 40, § 75; Tex. Health and Safety Code Ann. § 313.004.

The proposed statutory addition would apply only to incapacitated patients who do not have an advance directive, a court ordered conservatorship, or guardianship that names an available Agent. Providing a statutorily authorized priority list of surrogate decision makers would provide certainty both to patients and their families and to the healthcare providers, including hospitals and physicians, charged with providing care.

Reasons for the Proposal. The failure of California law to provide a priority list of authorized surrogate decision makers impedes the delivery of health care services by creating ambiguity as to who may lawfully consent to services on behalf of an incapacitated patient who has not designated an Agent. For example, unlike the law in many other states, California law does not expressly authorize an incapacitated patient's spouse to make health care decisions on behalf of the patient absent an advance directive to that effect. Under current law, a health care provider may seek judicial appointment of a conservator for such a patient pursuant to Probate Code Section 3200 *et seq.* but that option is impractical due to expense, the reluctance of many courts to intervene, and the time sensitive nature of these situations. In many instances, a patient cannot forgo care for the days or weeks that it often takes for a conservator to be appointed.

While the proposed law would establish an order of authority among listed decision makers, that priority list would not trump the wishes of the patient. The priority list would be used only to identify a decision maker if the patient has not designated an Agent. The priority list would never come into play for a patient who has designated an available Agent. Additionally, an individual with capacity would always be free to designate an Agent other than as provided by the proposed law. In other words, using the first example cited in the paragraph above, a married individual would be free under the proposed law, as under current law, to execute an advance directive that names an Agent other than the individual's spouse, if that is his or her desire.

It is also important to bear in mind that the proposed law would provide only for designation of a decision maker; it would not attempt to dictate how decisions should be made. Rather, the Agent, whether designated by the patient in an advance

directive or selected according to the proposed hierarchy, must, as required by existing law, make decisions consistent with the previously expressed wishes of the patient, if known, or consistent with the patient's best interest. Additionally, existing law does not preclude an individual from challenging the decision of an authorized surrogate if the surrogate is acting inconsistently with the previously expressed wishes of the patient or the patient's best interest, and the creation of a priority list for patients who have not previously designated an Agent in an advance directive would not change the ability to so challenge a decision of an authorized surrogate. All remedies currently available at law would continue to be available under the proposed law in the event that family members have a legitimate dispute as to an incapacitated patient's treatment. Those remedies include court intervention to appoint a conservator pursuant to Probate Code Section 3200 *et seq.* In such instances the court would not be bound to follow the proposed order of authority. The proposed law would neither expand nor narrow available treatment options.

Any discussion of end of life care brings to mind the recent media coverage and litigation involving Theresa Schiavo ("Schiavo"); however, those events do not undercut the need for the proposed law. The Schiavo case involved a young woman who became severely brain damaged as a result of a cardiac arrest in 1990. Schiavo then remained in a permanent vegetative state for many years. *See In re Guardianship of Schiavo*, 780 So.2d 176, 177 (Fla. App. 2 Dist., 2001). Schiavo had limited to no ability to communicate or care for herself. *See id.* Schiavo's husband, Michael, was appointed as her guardian pursuant to Florida law. Michael, after evaluating Schiavo's medical condition and, presumably after considering her previously expressed wishes concerning end-of-life treatment, sought to withdraw artificial nutrition and hydration and allow Schiavo to die. After learning of Michael's proposed decision, Schiavo's parents sought court intervention to prevent the withdrawal of care. *See id.* at 177-178. In affirming the decision of the lower court, the District Court of Appeal of Florida found that Michael Schiavo had demonstrated by clear and convincing evidence that Schiavo had previously expressed a desire that she would not want to be maintained in a permanent vegetative state and ordered removal of artificial nutrition and hydration.[5] Thus, at its core, the Schiavo case involved a dispute between Schiavo's husband (and guardian) and her parents over the previously expressed wishes and best interest of a nonterminal patient in a permanent vegetative state.

As stated above, current California law does not preclude an individual from challenging the decisions of an authorized Agent if the Agent is alleged to be acting inconsistently with the previously expressed wishes of the patient or the patient's best interest. The Committee does <u>not</u> propose to modify that aspect of the law and Section 4712, as proposed, would have no impact on that process. In other words, an individual would be free to challenge the decisions of an Agent, whether designated by the patient or authorized under Section 4712, if the Agent's decisions are alleged to be inconsistent

[5] The Schiavo litigation was followed by various highly publicized interventions by the Florida Governor and Legislature. Such interventions are highly unusual and the collective experience of the Committee members indicates that family members generally do not disagree as to appropriate treatment and courts only rarely become involved.

with the patient's previously expressed wishes or best interest. Addition of Section 4712 would not affect the right of a party to seek judicial intervention nor would it make judicial intervention any more or less likely to occur. Additionally, a court's decision to order or withdraw medical treatment would continue to be guided by the patient's previously expressed wishes and best interest, without regard to Section 4712.

III. Pending Litigation

To our knowledge, no litigation is pending on this issue.

IV. Likely Support and Opposition

We anticipate that the proposed addition of Section 4712 would receive the strong support of the hospital and physician communities, as well as patient's rights groups. The Committee does not currently expect any opposition, although any groups that opposed adoption of the Health Care Decisions law might also oppose the proposed law.

V. Fiscal Impact

None expected.

VI. Germaneness

The subject matter of the proposed Section 4712 is one in which the members of the Business Law Section (and, in particular, the members of the Health Law Committee) have special experience and expertise since the Committee members represent and advise public and private hospitals and health systems, physicians, and patients concerning medical consent issues. The subject matter of the proposed Section 4712 requires the special knowledge, training, experience, and technical expertise of the Business Law Section, Health Law Committee. The Committee has considered the interests of all affected parties in drafting the proposed Section 4712 and the Committee has determined that addition of the proposed Section 4712 would promote clarity, consistency, and comprehensiveness of the law.

VII. Text of proposal

Probate Code Section 4712.

(a) If an adult patient lacks capacity to make health care treatment decisions, a health care provider shall make a reasonable effort to locate and shall follow an advance health care directive. In the event that an adult patient who lacks capacity does not have an advance health care directive that designates a reasonably available agent, the patient does not have a court appointed guardian or conservator who has authority to make health care decisions, and the patient lacks capacity to designate a surrogate, then a health care provider shall make reasonable efforts to contact the following individual or individuals in the indicated order of priority and authority to act as the patient's surrogate, as defined in Section 4643:

(1) The patient's spouse or the patient's registered domestic partner as set forth in Section 4716, unless (A) a decree of marital dissolution or legal separation has been entered between the patient and spouse, or (B) a proceeding for marital dissolution or legal separation between the patient and spouse has been filed and not dismissed, or (C) a Notice of Termination of Domestic Partnership has been filed with the Secretary of State.

(2) An adult child of the patient.

(3) A parent of the patient.

(4) An adult brother or sister of the patient.

(5) A grandparent of the patient.

(6) An adult grandchild of the patient.

(7) An adult relative of the patient. For the purposes of this paragraph, "an adult relative" means an adult, other than a person designated above, who is related to the patient and who has exhibited special care and concern for the patient, who is familiar with the patient's health care views and desires and is willing and able to become involved in the patient's health care and to act in accordance with the patient's previously expressed wishes or, if none are known, the patient's best interest.

(b) If more than one member of a single class set forth in subsections (a)(2) through (a)(7) above assumes authority to act as surrogate and the supervising health care provider is informed that the members of such class do not agree on a health care decision, the supervising health care provider shall comply with the decision of a majority of the members of that class who have communicated their views to the provider. If the class is evenly divided concerning a health care decision and cannot come to agreement on the treatment decision, that class and all individuals having lower priority shall be disqualified from making that health care decision for the patient.

(c) A surrogate shall communicate his or her assumption of authority as promptly as practicable to available members of the patient's family and to the health care provider.

(d) A health care provider may rely on a decision made by a surrogate for a patient pursuant to this section without obtaining judicial approval.

Membership in the BUSINESS LAW SECTION is voluntary and funding for Section activities, including all legislative activities, is obtained entirely from voluntary sources.

Very truly yours,

Jeffrey C. Selman
Vice-Chair, Legislation

cc: Suzanne S. Graeser, Esq.
Chair, Executive Committee

David Vukadinovich, Esq.
Co-Chair, Health Law Committee

Michael F. Klein, Esq.
Co-Chair, Health Law Committee

Carol Lucas, Esq.
Member, Executive Committee

Jocelyn Daillaire, Esq.
Office of General Counsel, State Bar of California

Attachment C

Robert L. Brent, Esq.
rlbmail@ucla.edu

I. THE ARBITRATION CLAUSE

1. IS ARBITRATION THE WAY TO GO? WHEN IS THIS DECISION USUALLY MADE?

As a general rule, it is near the end of transactional negotiations that attorneys first address the issue of how to resolve possible future disputes in connection with the transaction at hand. It is at this juncture that the corporate or transactional attorneys for both parties start to negotiate wording concerning the resolution of future disputes and for the first time the word **arbitration** may be heard.

2. UNFORTUNATELY, THE DECISION WHETHER OR NOT TO INSERT AN ARBITRATION CLAUSE INTO THE DOCUMENTS, TO SETTLE FUTURE DISPUTES, MUST BE MADE WITHOUT THE BENEFIT OF KNOWING THE FACTS SURROUNDING A DISPUTE. SHOULD COUNSEL COMMIT NOW TO CHOOSE ARBITRATION TO RESOLVE POTENTIAL FUTURE DISPUTES, OR WOULD A TRIAL IN FRONT OF A JUDGE, WITH OR WITHOUT A JURY, BE THE BETTER CHOICE?

3. HOW SHOULD THAT DECISION BE MADE?

In fact, the negotiation for wording concerning the resolution of future disputes should be anticipated by both sides at the very beginning of transactional negotiations. The corporate or transactional lawyers should meet with their clients, and the litigation department, well before the transactional negotiations have progressed to their final stage. The client should be able to identify potential types of disputes that can occur in the future. Based upon this information, the litigation department can determine the best forum, and what discovery rules and other specifics would most benefit the client.

4. THAT'S NOT WHAT USUALLY HAPPENS!

Instead, the decision concerning the use of arbitration for resolving disputes is not based upon input from the client or advice from the litigation department. It is often based upon the limited arbitration experience of the lawyers or upon anecdotes told at the office or at social events where you hear such old tales as "arbitrators always split the baby", or "they don't usually follow the law." In fact, a survey by the American Arbitration Association in 2000 found that in 75% of the cases the awards were clearly in one party's favor and in only 9% of the time was the award between 41% and 60% of the amount claimed.

WHAT USUALLY HAPPENS ONCE THE PARTIES DECIDE TO PUT AN ARBITRATION CLAUSE INTO THE CONTRACT?

The attorney will either:

- pull a clause from another contract he or she happens to have in the desk, or
- ask the attorney in the next office if he or she has an arbitration clause handy or,
- go to the firm's files and use the first arbitration clause that comes up.

5. ONCE THE CLAUSE IS INSERTED INTO THE CONTRACT AND NEGOTIATIONS ARE COMPLETED, WHAT HAPPENS NEXT?

The contract usually does not see the light of day again until there is a dispute: At that time the contract is sent to the litigation department which then has to live or die by the terms of the arbitration clause.

6. HERE'S WHAT SHOULD HAVE HAPPENED!

The following questions should be asked and answered before making a decision. If it is decided to use arbitration, then after answering these questions and analyzing the situation relating to future disputes, a decision is made concerning what provisions specific to the client's needs, should be negotiated into the arbitration clause.

A. Is it more likely that the client will be a plaintiff or a defendant?

B. Is it more likely that the client will have to pay money or receive money? Therefore, do we want a faster process, such as arbitration, or a slower court trial?

C. Is the client better off with a lot of discovery or little discovery?

D. Will the client be better off with or without a jury? Is its reputation such that a jury will likely have a favorable or a negative image? With the Enron, World Com, Tyco and Healthsouth trials in the news, we have to try and project how juries will look at the client, as well as the opposing party, based upon the probable facts of the dispute[1]. Is the client a big corporation and the other party the little guy-- or visa versa?

E. Will the client be better off if the decision maker follows the letter of the law or would it be better if equity is involved in the decision?

[1] John H. Henn, *Where Should You Litigate Your Business Dispute?*, Dispute Resolution Journal, August/October 2004.

F. How will the client feel about the cost of future litigation? We should discuss this with the client now and not wait until a dispute arises. Generally, since arbitration procedures are speedier than court trials, arbitration is more cost effective. Another factor is that management will most likely not be as involved in the arbitration process when compared to a courtroom proceeding. This results not only in a great cost-savings but also permits the executives to spend more time at their jobs[2]. This savings would be especially evident if the parties chose one arbitrator instead of a panel, and if they provide for limited discovery. Even with discovery provisions in the arbitration clause, arbitrators will limit discovery, thereby reducing attorneys' fees and freeing up management's time. The taking of depositions is usually limited by arbitrators.

G. Is privacy a factor? Arbitration decisions are not published. In the event there is litigation would the client benefit from publicity or would it be harmful? Can this litigation hurt the client in possible future disputes with other parties? For instance, is the client a company that will be entering into similar contracts with many facilities, such as hospitals, and can a losing court trial be used as res judicata in other disputes? Arbitration offers some protection from that problem.

[2] ibid

1. However, see the discussion under Arbitrator Disclosure. California, under certain circumstances, requires arbitrators to disclose the names of the parties to a prior arbitration, the prevailing party and the amount of the award.

H. Is the client likely to adjudicate the dispute in an out-of-state location? If that is the case, consideration must be given to possible jury bias. This can be an issue in small town situations. In arbitration you have a great deal of input concerning who the arbitrator(s) will be.

7. SOME OR ALL OF THE FOLLOWING SHOULD BE DISCUSSED WITH THE CLIENT AND WITH THE LITIGATION DEPARTMENT AND NEGOTIATED WITH THE OTHER SIDE PRIOR TO INSERTING THE ARBITRATION CLAUSE INTO THE CONTRACT:

A. **Do you want one or three neutral arbitrators?**

1. In large complex cases it is not uncommon for the parties to designate three neutral arbitrators.

2. The parties may believe that a substantial claim could be involved in a future dispute and in such event they would feel more comfortable with three arbitrators, whereas one arbitrator would be used for smaller

a. The following clause will provide for three arbitrators in larger claims:

"In the event that any party's claims exceed "x' dollars, exclusive of interest and attorneys' fees, the dispute shall be heard and determined by three arbitrators."

3. There are other factors to take into consideration before deciding whether to name one or three arbitrators in the clause.

a. With three arbitrators, not only have you tripled the cost of the arbitrators, you have probably increased the cost by four to five times. The three arbitrators will have opinions and their ethical obligations as arbitrators will require discussions and negotiations amongst themselves, even if the parties agree that the presiding arbitrator can make decisions alone on non-dispositive issues such as document disputes.

b. The arbitration process will probably take longer because of this arbitrator inter-play, and your clients will be away from their businesses for a longer time.

c. What are the chances of a single arbitrator making an outrageous decision? Not very great, and there may be an opportunity to appeal such a decision. How often are judge's decisions appealed? These are factors in deciding whether to use one arbitrator even in large disputes.

B. **How will you find potential arbitrators?**

1. Will you use an organization to provide the list of neutral arbitrators or will the parties agree to a list of possible arbitrator(s) before or after the dispute has arisen?

C. **Will you use an organization that administers the proceedings and arranges scheduling and other clerical matters, such as the American Arbitration Association, or JAMS? Or will you have the arbitrator(s) administer the hearings as is the case with the AHLA panel?**

D. **Do you want arbitrators with specific skills, training or experience?**

1. You can designate in the clause that the arbitrator will be an attorney, C.P.A., architect, hospital administrator, real estate broker, engineer or other educated or experienced person.

E. **Should the parties be required to meet and confer before initiating arbitration?**

1. Often, this results in either a settlement, or the issues are narrowed and/or reduced.

2. Here is a clause:

"In the event of any dispute, claim, questions, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions or differences shall be finally settled by arbitration administered by _____ in accordance with the provisions of its _____ Arbitration Rules."

F. **Should the parties be required to mediate in good faith before initiating arbitration?**

1. This provision presents positive and negative aspects. If the parties have not thought of mediation themselves it may be an expensive waste of time or they may not be ready to seriously mediate. In a worse case scenario, the mediation setting may be used by a party to obtain information about the opponent's case without being a good-faith participant in the process.

2. Here are two clauses, one from the American Arbitration Association which just addresses mediation, while the other clause, from JAMS, addresses mediation and arbitration:

   a. *"If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Rules before resorting to arbitration, litigation, or some other dispute resolution procedure."*

b. *"The parties agree that any and all disputes, claims or controversies arising of or relating to this Agreement shall be submitted to JAMS, or its successor for mediation, and if the matter is not resolved through mediation, then it shall be submitted to JAMS, or its successor, for final and binding arbitration pursuing the arbitration clause set forth above. Either party may commence mediation providing to JAMS and the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with JAMS and with one another in selecting a mediator from JAMS' panel of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that will share equally in its costs. All offers, promises, conduct and statements whether oral or written, made in the course of the mediation by any of the parties, their agents, employees, experts and attorneys, and by the mediator, any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the parties, provided that evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its use in the mediation. Either party may initiate arbitration with respect to the matters submitted to mediation by filing a written demand for arbitration any time following the initial mediation session or 45 days after the date of the written request for mediation, whichever occurs first. The mediation may continue after the commencement of arbitration if the parties so desire. Unless otherwise agreed by the parties, the mediator shall be disqualified from acting as arbitrator in*

the case. The provisions of this Clause may be enforced by Court of competent jurisdiction, and the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys' fees, to be paid by the party against whom enforcement is ordered."

G. THE MEDIATOR AS ARBITRATOR

1. The general policy in ADR has been that a mediator is a mediator and an arbitrator is an arbitrator and one person should not wear both hats in the same proceeding. The rationale is that during a mediation the parties may disclose certain facts or weaknesses in their case to the mediator, which may not be admissible in an arbitration. If the mediation is not successful, the mediator who now becomes the arbitrator is privy to this information which may affect his or her decision. In addition, one party may conclude that the mediator is biased in favor of the other side and may move to disqualify the mediator from acting as the arbitrator.

2. Even though most organizations discourage parties from using the services of one person in both capacities, we are seeing more and more situations where the parties request that the arbitrator at some point in the proceedings (usually near the beginning) take off his or her arbitrator's hat and attempt to mediate the dispute.

a. One author in fact reverses the conventional wisdom and advocates using Arbitration first, putting the decision in a sealed envelope while the parties mediate for a set time period. If agreement is reached, the arbitrator tears up the envelope and the decision is never revealed[3].

3. Here is a clause that provides for one person to act in both the capacity of mediator and arbitrator:

> *"If a dispute arises from or relates to this contract or the breach thereof, and if the dispute cannot be settled through direct discussions, the parties agree to endeavor first to settle the dispute by mediation administered by _____ _____ under its_____I Mediation Rules, before resorting to arbitration. Any unresolved controversy or claim arising from or relating to this contract or breach thereof shall be settled by arbitration administered by _____ in accordance with its_____ Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. If the parties agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator."*

[3] Arnold Zack, *A Case For Arb-Med*, Dispute Resolution Journal, November, 2003-January, 2004.

H. **Where will the hearings be held?**

1. Do not minimize the financial and emotional cost of holding hearings away from the client's city. The client and the witnesses will not be at their best when testifying. They will probably be fatigued from travelling, uncomfortable in a strange place and housed in unfamiliar hotels away from the comforts of their homes and away from their businesses.

I. **Is the choice of law clearly spelled out in the contract?**

J. **Do we want broad or limited discovery rights?**

1. If broad discovery provisions are not spelled out in the clause, generally there is very limited discovery in arbitration unless the parties and the arbitrator agree.

2. Here are two examples of what I call "Vanilla" clauses. These provide for very limited discovery and theoretically should result in the most efficient and economical resolution of the dispute.

   Two examples are shown below :

   a. *"Any controversy or claim arising from or relating to this contract or the breach thereof shall be settled by arbitration administered by under its (applicable) Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."*

b. *"Any dispute, claim or controversy arising out of or relating to this Agreement, the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration), before (one) (three) arbitrator(s). The arbitration shall be administered by pursuant to its _____ Arbitration Rules and Procedures. Judgment on an Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction."*

3. Rule 21 of the American Arbitration Association "Exchange of Information" provides in part:

> *"(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct*
> *i) the production of documents and other information, and*
> *ii) the identification of any witnesses to be called"*

4. Even with a "Vanilla" clause and the Exchange of Information described in Rule 21 above, you may want to spell out the requirement for document exchange so that the arbitrator is aware of the wishes of the parties at the time the agreement containing the arbitration clause, was signed.

a. Here is a clause:

"Consistent with the expedited nature of arbitration, each party will, upon the written request of the other party, promptly provide the other with copies of documents (relevant to the issues raised by any claim or counterclaim) (on which the producing party may rely in support of or in opposition to any claim or defense). Any dispute regarding discovery, or the relevance or scope thereof, shall be determined by the [(arbitrator(s)] (chair of the arbitration panel), which determination shall be conclusive. All discovery shall be completed within (45) (60) days following the appointment of the arbitrator(s)."

5. Since one of the main objectives of arbitration is to have a speedy and efficient resolution of disputes, the arbitrator will restrict discovery even with broad discovery provisions in the clause, and even if the parties agree to broad discovery before or during the hearing, Here is a clause that incorporates the discovery provisions of the California Code of Civil Procedure:

"The parties agree that with respect to discovery, each party shall have all of the rights available pursuant to the California Code of Civil Procedure and hereby incorporate the provisions of the California Code of Civil Procedure Section 2016 – 2033 into this Agreement"

a. Depositions are often a touchy issue in arbitrations. They are very time consuming and expensive. Arbitrators generally restrict the taking of depositions even with broad discovery provisions in the clause. If, however, you believe that the taking of depositions will be critical to your client's representation, then

by all means spell out such discovery rights in the clause. Since the arbitrator is bound by the arbitration contract under which he or she has been hired, if your clause is very specific, then it is likely that the arbitrator will follow its terms. The factors that will influence the arbitrator's decision to approve the request to take depositions include such facts as the unavailability of an important witness for the hearings, out of state witnesses, seriously ill witnesses and being able to convince the arbitrator that the deposition of a key witness will provide information that will result in shortening the time of the arbitration hearings.

Here is a clause that attempts to guide the arbitrator as to the intent of the parties:

> *"At the request of a party, the arbitrator(s) shall have the discretion to order examination by deposition of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions shall be limited to a maximum of (three) (insert number) per party and shall be held within 30 days of the making of a request. Additional depositions may be scheduled only with the permission of the [arbitrator(s)] [chair of the arbitration panel], and for good cause shown. Each deposition shall be limited to a maximum of (three hours) (six hours) (one day's) duration. All objections are reserved for the arbitration hearing except for objections based on privilege and proprietary or confidential information."*

K. **Do you want a reasoned award?**

1. Generally, arbitrators will not write a reasoned award unless such an opinion is requested by both parties, usually at the start of the arbitration. It is not uncommon for the parties in large, complex cases to request such awards. A reasoned award can mean substantially higher arbitrator costs. However, it may also give you the opportunity to either request a review of the award by the arbitrator or an opportunity to appeal the award in the event that the award does not conform to the terms of the contract with the arbitrator. This is discussed in **Section 111 Case Law Developments and Lessons.**

   a. Here are some choices if you believe that a reasoned award provision should be a part of the clause:

   1. *"The award of the arbitrator(s) shall be accompanied by a reasoned opinion."*
   2. *"The award shall be in writing, shall be signed by a majority of the arbitrators, and shall include a statement regarding the reasons for the disposition of the claim."*
   3. *"The award shall include findings of fact and conclusions of law."*
   4. *"The award shall include a breakdown as to specific claims."*

L. **Does the winning party get reimbursed for:**

1. Attorneys Fees?
2. Arbitrators' Fees?
3. Cost of administering the arbitration?

M. **How do you define "winning party" in the clause?**

1. Is the "prevailing party" a good term to use?
2. How do you define "prevailing party"?
3. Should you define prevailing party in the clause?
4. What do you think about this clause?

> *"The costs and expenses of the arbitration, including without limitation the arbitrator, attorneys' fees and costs, shall be apportioned between the parties by the arbitrator in his or her determination of the relative merits of each party's position.*

N. **Would "Baseball" Arbitration be appropriate in your situation?**

1. Baseball arbitration is a procedure that involves each party submitting a number to the arbitrator(s) and serving the number on the other party with the understanding that the arbitrator(s), after the hearing, must award either one of the numbers submitted and nothing else. The arbitrator is not permitted to make an independent decision based on the merit of the case and must choose one of the numbers submitted by the parties. This method provides a party with the incentive to pick a very reasonable number as it increases the chances

that the arbitrator(s) will select that number. Baseball arbitration is also intended to avoid a decision that goes way beyond what the parties anticipated. Here is such a clause:

> *"Each party shall submit to the arbitrator(s) and exchange with each other in advance of the hearing their last, best offer. The arbitrator(s) shall be limited to awarding one or the other of the figures submitted."*

O. **The prevailing rule is that the arbitrator can hear summary adjudication motions, award appropriate damages and provide any relief that a court can provide, and even award sanctions in certain circumstances, unless limited by enforceable contract provisions. However, because in certain jurisdictions it is perceived that courts are reluctant to grant such powers to arbitrators in order to avoid ambiguities, it is recommended that the authority of the arbitrator to grant or deny such relief be spelled out in the clause[4].**

[4] David v Abergel, 46 Cal. App. 4th 1281 (2nd Dist. 1996) where the court said that an arbitrator could award sanctions where the agreement granted the arbitrator the power to "grant any remedy or relief to which a party is entitled under California law."

1. What about summary adjudication?

   a. While arbitrators are generally permitted to rule on motions for summary judgment and motions for judgment on the pleadings, do you want the arbitrator to have this power?

2. Consider whether in any future dispute, injunctive relief might be sought by your client or the opposing party. If so, will your jurisdiction permit an arbitrator to provide such relief? Even if it will, would you rather have a court decide?

   a. Below is a clause that gives the arbitrator the authority to grant injunctive relief:

> "Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, *without waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the establishment of the arbitral tribunal (or pending the arbitral tribunal's determination of the merits of the controversy).*"

b. Below is a clause that requires the party to seek injunctive relief in the courts:

> *"Notwithstanding the foregoing, in the event that either party desires to obtain injunction relief, the party may file an action in the Superior Court of the State of California, County of Los Angeles, seeking such relief. They may obtain a temporary restraining order, a preliminary injunction, a permanent injunction, and such other relief or remedies and arbitration, as provided above, shall continue."*

3. What about punitive damages? Do you want to restrict the arbitrator by providing in the clause that no punitive damages can be awarded in this matter? Is it more likely that your client will be seeking punitive damages? If so, it would be better to put wording in the contract that the arbitrator(s) may provide such relief. The reverse would also be true if you fear that the other party would be the more likely to pursue punitive damages. In such event, your clause should specifically prohibit punitive damages. Here is a clause:

> *"The arbitrator(s) will have no authority to award punitive or other damages not measured by the prevailing party's actual damages, except as may be required by statute."*

4. Below are clauses limiting the damages the arbitrator may award.

a. *"In no event shall an award in an arbitration initiated under this clause exceed $_____."*

b. *"In no event shall an award in an arbitration initiated under this clause exceed $_____for any claimant."*

3. *"The arbitrator(s) shall not award consequential damages in any arbitration initiated under this section."*

d. *"Any award in an arbitration initiated under this clause shall be limited to monetary damages and shall include no injunction or direction to any party other than the direction to pay a monetary amount."*

e. *"If the arbitrator(s) find liability in any arbitration initiated under this clause, they shall award liquidated damages in the amount of $_____."*

f. *"Any monetary award in an arbitration initiated under this clause shall include pre-award interest at the rate of___% from the time of the act or acts giving rise to the award."*

P. IN CONNECTION WITH REMEDIES AVAILABLE TO THE ARBITRATOR, SHOULD THE ARBITRATOR BE REQUIRED TO FOLLOW THE PROVISIONS OF THE CONTRACT? THE LAW?

Here is a clause which attempts to limit the arbitrator's available remedies:

"The arbitrator shall not have any power to alter, amend, modify or change any of the terms of this agreement nor to grant any remedy which is either prohibited by the terms of this agreement or is not available in a court of law."

Q. **APPEAL**

1. Sometimes, in large complex cases, the parties want to have rights of appeal beyond the usual narrow circumstances where the courts will overturn the arbitration award. In **Section III CASE LAW DEVELOPMENTS AND LESSONS** we discuss recent decisions.

Here is a clause used by the American Arbitration Association.

> *" Within 30 days of receipt of any award (which shall not be binding if an appeal is taken), any party may notify the AAA of an intention to appeal to a second arbitral tribunal, constituted in the same manner as the initial tribunal. The appeal tribunal shall be entitled to adopt the initial award as its own, modify the initial award or substitute its own award for the initial award. The appeal tribunal shall not modify or replace the initial award except (for manifest disregard of the law or facts) (for clear errors of law or because of clear and convincing factual errors). The award of the appeal tribunal shall be final and binding, and judgment may be entered by a court having jurisdiction thereof."*

Attachment D

APPLICATION FOR APPOINTMENT TO CALIFORNIA STATE BAR
BUSINESS LAW SECTION STANDING COMMITTEE

Print out and complete the following application and return with resume. Applications will be accepted until all vacancies are filled.

Robert G. Harris
Binder & Malter
2775 Park Ave
Santa Clara CA 95050
408 295-1700
FAX 408-295-1531
rob@bindermalter.com

For more information, see Business Law Standing Committee Appointments.

Part I of III: Part II of III.

(Name of Applicant) FRED WEIL
(Firm or Employer) WELLS SMALL & SELKE
(Business Address) P.O. BOX 991828
(City, Zip Code) REDDING, CA
(Telephone Number) 530-223-1800 (Fax Number) 530-223-1809
(E-mail Address)

California State Bar Admission Year: 1984;
Bar Number: 116350
Member of Business Law Section: Y (Y/N)

Other State Bar Admissions ~~CA~~ AZ
(State & Date) 1982

(Applicants must have been a member of a state bar for at least 5 years and must be a member of the Business Law Section of the California State Bar.) I apply for appointment to the following Committee (if more than one, please list in order of preference):

1. HEALTH LAW
2. PARTNERSHIP
3.
4.

Have you previously applied for appointment to a Business Law Section Committee without being appointed? Year and Committee:

PARTNERSHIP - 2004

Previous Bar Section or Committee service (dates and description):

PARTNERSHIP

Other bar association activities (describe membership on committees, publications, etc.):

TAX ADVISORY COM, BOARD OF SPECIAL.

I am presently:

___ a sole practitioner	___ in a 35+ lawyer office
_X_ in a 2-10 lawyer office	___ in a corporate law department
___ in an 11-35 lawyer office	other _____

Applicants are requested, but not required, to complete this part of the Appointment Application. The Business Law Section strives to have the composition of its Standing and Ad Hoc Committees reflect the diversity of its membership. The Section urges members of underrepresented groups to apply for Committee membership. It is the policy of the State Bar of California to provide equal access to State Bar entities to all applicants. The State Bar does not discriminate against persons on the basis of gender, race, color, ancestry, religious creed, national origin, physical disability (including HIV and AIDS) or mental disability, medical condition (cancer), age (over 40), marital status, denial of family care leave, political affiliation, sexual orientation, disabled veteran or Vietnam era veteran status.

The following information is not required and any decision to supply all or any part of the requested information will not adversely affect your chances for appointment. We are giving you the opportunity to complete this portion of the Appointment Application in order to review our progress in complyin g with this policy and to better evaluate the efforts of our recruitment and appointment process. Please indicate which of the following categories describes you:

Male X Female ____ Your Age 47

Please indicate which one of the following categories describes you:

___ Native American or Alaskan (Descended from any of the original peoples of North America)	___ Hispanic (Mexican, Puerto Rican, Cuban, Central or South American)
___ Filipino	___ Indian subcontinent (Pakistan, India, Bengal, etc.)
___ Pacific Islander(Melanesian, Malaysian, Polynesian)	___ African-American/Black (excludes persons of Hispanic origin)
___ Asian (includes Chinese, Japanese, Korean, and peoples of Southeast Asia)	_X_ White (includes persons having origin in any of the original peoples of Europe, Russia, North Africa, and the Middle East, generally corresponding to those persons not classified into one of the categories listed above.)

If the above designations do not best describe you, please provide the description you prefer:

Part III of III.

Please remember to attach a copy of your resume. Signature and Date (Required).

Date: FWil	Signature: 8/31/05

Frederick James Weil
292 Hemsted Drive
P.O. Box 991828
Redding, California 96099-1828

EDUCATION:

University of San Diego	LL.M. (Taxation)	1984
University of Arizona	J.D.	1982
University of Southern California	A.B	1979
University of Madrid		1978

EMPLOYMENT:

WELLS SMALL SELKE & GRAHAM. Offices in Redding, California. 1994-present. Substantial areas of practice include taxation and transactional business matters, primarily for health care providers. Practice includes health care law, contractual matters, tax planning and compliance, managed care, general corporate matters and finance, business law, transactional analysis, corporate reorganization , securities regulation, complex document preparation, acquisition and sale, insurance issues, regulatory compliance, Medi-Cal and Medicare matters, employment law & general business advice. Tax Litigation included $16,000,000.00 sales tax refund case before the State Board of Equalization and successful defense of Municipality in multi-million dollar Sales Tax refund case. Qualified as expert witness in Shasta County Superior Court in matters in involving partnership disputes and taxation matters.

Other legal-related employment since 1979

- - -

BAR ASSOCIATIONS:

State Bar of Arizona (1982) State Bar of California (1984), United States Supreme Court (2005), US Tax Court (1982) Federal District Court - - Arizona (1982) Federal District Court - - Central District of California (1985), Federal District Court - - Northern District of California (2005), Ninth Circuit Court of Appeals (1982) Colorado River Indian Tribal Bar (1982),

Member State Bar of California Business Law Section, State Bar of California Taxation Section. Member State Bar of California Business Law Section Committee on Partnerships and Unincorporated Associations. (1994-1997) Chairman - Limited Partnerships Subcommittee (1997). Member - RUPA Subcommittee, Member - LLC Subcommittee. Member - Shasta - Trinity Bar Association. Member - State Bar Corporations Committee (1997-9)

Appointed to the California Taxation Advisory Commission (1997- 2000), Vice-Chairman, Tax Advisory Commission (1998), Chairman Tax Advisory Commission (1999-2000) Exam Author of Partnership taxation question for 1999 California Certified Specialist Exam (1999) Grader - - California Certified Specialist Exam (1999 & 2000)

AWARDS:

Certified Specialist in Taxation Law, State Bar of California, California Board of Legal Specialization

Received Commendation from State Bar in 1986 for assistance in Indigent Legal Defense.

Man of the Year Award - - 1989 - - Greater Inland Filipino Association.

Appointed to State Bar of California's Taxation Advisory Commission - - 1997

Kenneth S. Prag Memorial Pro Bono Publico Award 2002. Award from bar association for the lawyer during the year demonstrating the largest commitment to pro bono service in the community.

State Bar of California Standing Committee on the Delivery of Legal Services, 2003 President's Pro Bono Service Awards Nominee;

Named "Northern California Super Lawyer" 2004 and 2005 by San Francisco Magazine and California Trade and Commerce Magazine.

ARTICLES AND PUBLICATIONS:

Co-drafter: Guide to Operating a Limited Liability Company in California, CEB 1996

Co-Author: "*Current Developments in Partnerships for 1995*" Business Law Section News (Spring 1995)

Author: "*The Limited Liability Company in California*" Trade and Commerce Magazine, January 1995.

JUDICIAL AND TEACHING

Judge Pro-Tem Shasta County Municipal Court (1994-)

Instructor, Contract Law, Business Organizations, Shasta College Paralegal Program (1995 -7)

Chief Arbitrator, Shasta County Bar Association Fee Arbitration Program.

SEMINARS PANELIST/ INSTRUCTOR :

"Health Care Law, The New Rules for 1994" - - Medical Law, WWS &G (1994)

"Organizing a Non-Profit Corporation" - - California Grant & Resource Center, 1995

"Director Conflict of Interest" - - Non-profit Roundtable, California Grant & Resource Center, 1996

"Real Estate Tax" - - Lorman Business Center

"Buying and Selling your Business" - - Redding Chamber of Commerce, 1995

"Current Business Law Issues" - - Redding Economic Summit, 1995

SEMINARS PANELIST/ INSTRUCTOR (continued) :

"Sales Tax in California" - - Lorman Business Center Accounting Seminars (Summer 1995, Summer 1996)

"The LLC in California" - - WWS &G (1994)

"New Developments in Business Law - - Redding Chamber of Commerce 1997

"Taxation Law for the Non-Tax Lawyer" - - Shasta Trinity Bar Association (1997)

"Should You Incorporate Your Health Care Practice - - WSSG

"Director Conflicts of Interest"- - California Association of Rural Health Care Providers (1998)

"Legal Issues for Long-term Patients" - - Northern California Retirement Home Association (1998)

"Retirement Planning for Small Business" - - Redding Chamber of Commerce (1998)

"Avoiding Director Conflicts of Interest" - - Redding Medical Center Non-Profit Forum (1999)

"Medical Records in California" - - WSSG (2001)

"Choice of Entity In California" - - National Association of Paralegals, (2004)

"Complying With HIPAA" - - Multiple Locations in (2004)

- - - -